

FEDERAL CIRCUIT COURT OF AUSTRALIA

*SAGGU & ANOR v MINISTER FOR
IMMIGRATION & ANOR*

[2014] FCCA 3166

Catchwords:

MIGRATION – Judicial review of a decision of the Migration Review Tribunal
– jurisdictional error not revealed – application dismissed with costs.

Legislation:

Federal Circuit Court Rules 2001 (Cth), r.16.01

Migration Act 1958 (Cth)

Migration Regulations 1994 (Cth), cl.857.223 of Schedule 2

Cases cited:

Vyas v The Minister for Immigration and Citizenship (2012) 263 FLR 131

First Applicant:	HARPREET KAUR SAGGU
Second Applicant:	HARMEET SAGGU
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	ADG 348 of 2013
Judgment of:	Judge Simpson
Hearing date:	12 August 2014
Date of Last Submission:	12 August 2014
Delivered at:	Adelaide
Delivered on:	12 August 2014

REPRESENTATION

The Applicants:

In Person

Solicitors for the Respondents:

Mr P d'Assumpcao for the Australian
Government Solicitor

ORDERS

- (1) The application is dismissed pursuant to r.16.01 of *Federal Circuit Court Rules 2001* (Cth).
- (2) The Applicants do pay the First Respondent its costs fixed in the amount of FIVE THOUSAND DOLLARS (\$5,000.00).

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT ADELAIDE

ADG 348 of 2013

HARPREET KAUR SAGGU

First Applicant

HARMEET SAGGU

Second Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

(Reasons settled from transcript)

1. I have before me an application for judicial review of a decision made in the Migration Review Tribunal (“the Tribunal”) filed on 21 November 2013.
2. I should say that the First Respondent in this matter has provided the Court with an Outline of Submissions. Although the Applicant was given the opportunity of filing an Outline of Submissions, as is often the case in these matters, they have not done so. In any event the First

Respondent has provided an Outline of Submissions. I acknowledge that I am relying heavily on the Outline of Submissions that were provided.

3. The Applicants are, I believe, husband and wife, Mrs Harpreet Kaur Saggu and Mr Hameet Saggu. The case concerns a challenge to a decision of the Second Respondent, that is, the Migration Review Tribunal. The Tribunal affirmed a decision of the Delegate of the Minister of Immigration and Citizenship not to grant the Applicants' Employer Nomination (Residence) (Class BW) subclass 857 (Regional Sponsored Migration Scheme) visas which I will, from now onwards, refer to as "the visa".
4. Absent a jurisdictional error, the Tribunal's decision remains a privative clause decision. It cannot be impugned. It has been said that at a high level a jurisdictional error identifies that the limitations upon the exercise of power have not been observed.
5. The First Applicant is an Indian National. On 7 September 2011, she lodged an application for the visa. Earlier, on 2 September 2011, an application was made to the Department by her nominated employer, Blanco Catering, for approval. The Applicant was required to satisfy public interest criteria 4020 referred to in cl.857.223 of Schedule 2 to the *Migration Regulations 1994* (Cth) ("the Regulations) to be eligible for the visa.
6. In essence, PIC 4020 requires that there be no evidence before the decision-maker that the visa applicant has given, or caused to be given, a bogus document or information that is false or misleading in a material particular in relation to a visa that the applicant held in the period of 12 months before the application was made. The Applicant has held a Student (Temporary) (Class TU) subclass 572 (Vocational Education and Training Sector) visa which ceased on 8 September 2011.
7. On 10 October 2011, the Delegate wrote to the Applicant inviting comment on information supplied with the application for her former student visa.

8. The Delegate had identified that the visa application was supported by an apparently fake loan letter from her initial student visa application. The Applicant was given 28 days to respond. She did so on 10 January 2012 through a Migration Agent.
9. The explanation for the bogus document directed attention to the actions of the Applicant's former agent in India when she had applied for a student visa. The Applicant maintained that all documents she provided to her former agent were genuine. On 27 August 2012, the Delegate refused to grant the visa to the Applicant on the basis that she did not satisfy PIC 4020 and cl.857.223 of the Regulations.
10. We move on to the Tribunal.
11. On 4 September 2012, the Applicant applied for review of the Delegate's decision by the Tribunal. On 21 August 2013, the Tribunal invited the Applicant to appear before it to give evidence and present arguments. On 23 August 2013, the Tribunal invited the Applicant to comment on information, namely, the bogus document which the Delegate considered and also the Department's inquiries into the genuineness of the bogus document in question.
12. The letter noted that the Tribunal had the power to waive PIC 4020 but only "*if satisfied that there are compelling circumstances that affect the interests of Australia or compassionate or compelling circumstances that affect the interest of an Australian Citizen, permanent resident or an eligible New Zealand citizen*".
13. On 16 September 2013, the Applicants' representative responded to the Tribunal's invitation to comment on the information. On 27 September 2013, the Applicant appeared before the Tribunal at a hearing at which time the employer also gave evidence.
14. On 17 October 2013, the Tribunal affirmed the decision under review.
15. The Tribunal's decision record set out the background, the evidence given at the hearing and the submissions that were put. Relevantly, the Applicant had conceded at the hearing, as she has done again today, that the bogus document was presented to the Department in connection with her student visa. The Applicant advanced submissions at the hearing seeking to waive PIC 4020. The Applicant focused,

relevantly, on the impact on the employer, should the Delegate's decision be affirmed. The Tribunal summarised the employer's evidence in its reasons.

16. Under the heading 'Consideration', the Tribunal commenced by noting that the issue was whether the Applicant met PIC 4020 as required by cl.857.223. It said that it had regard to the evidence on this topic and in particular, it matters not whether the bogus document was presented by the Applicant knowingly or unwittingly. The authority for such a proposition is to be found in the case of *Vyas v The Minister for Immigration and Citizenship* (2012) 263 FLR 131 at paragraphs 65 and 68. The Tribunal did not find it necessary, based on the case law it had cited, to determine whether the Applicant's assertions were true respecting the alleged fraud of her former agent.
17. The Tribunal found that the Applicant had given a bogus document to the officer within the meaning of PIC 4020. The Tribunal then proceeded to consider whether it was appropriate to waive the requirement. In doing so it expressly had regard to the employer's evidence. It said this at paragraphs 38-40:

"I have noted that Mr Blanco has stated that it is virtually impossible to find good cooks who can cook well and also have sound financial management skills and it would be an "irreparable setback" should the visa be refused. I have also noted that Mr Blanco refers to possible closure of Kiosk Food Service. I have also taken into account Mr Blanco's evidence to the effect that the business in any event has experienced high staff turnover.

Notwithstanding Mr Blanco's evidence being provided in relatively absolutist terminology, I am not satisfied that the Applicant's skills are so specialised or highly sought after that persons with similar skills and attributes could not be recruited. As to whether the Kiosk Food Service closes with consequences for Australian citizen and permanent resident staff, I consider that such a consequence is inherently speculative and contingent on other factors beyond whether or not the Applicant's visa is refused, such as the inherent viability of the business and the success or otherwise of attempts to recruit a replacement.

Even if the adverse consequences for the business are at the extreme end of Mr Blanco's predictions, I have concluded that the

circumstances that are said to act in the interests of Australia or the circumstances affecting Australian citizens and Australian permanent residents do not reach the gravamen of being compelling circumstances affecting the interest of Australia or compelling or compassionate circumstances affecting the interests of Australian citizens permanently resident or eligible New Zealand citizens.”

18. The Tribunal declined to waive PIC 4020 and concluded by affirming the decision under review.
19. On 21 November 2013, the Applicant filed an application for a judicial review to this Court. The Applicants’ application sought the following relief:
 - a) An order that the decision of the Tribunal be quashed.
 - b) A writ or prohibition preventing the First Respondent, his servants and agents from acting upon or giving effect to the Tribunal’s decision.
 - c) Such other relief as the court considers appropriate.
 - d) Costs be awarded.
20. The grounds of the application are in these terms, I read them verbatim:
 - “1. *The Tribunal has accepted that Australian business and permanent residents will be affected but still has not waived off PIC 3020.*
 2. *The Tribunal has not considered the fact that there was no need for me to give a bogus loan document especially when my father was working as manager of the bank.*
 3. *The Tribunal has not considered the fact that I had never given any bogus documents to immigration and I cannot be held liable for any act or conduct of the education agent, especially I had never given any bogus documents to the agent to pass it on to the immigration department.”*
21. I have given both Applicants the opportunity to put any submissions that they wish. They have had the assistance of an interpreter, although it seemed to me that certainly the First Applicant seems to speak very good English. I suspect that the Second Applicant also has good

English skills but I have only heard them speaking to the interpreter in the Indian language. It may be that there is some real need for an interpreter. In any event the Applicants have had the benefit of that. I have satisfied myself that the Applicants have received the First Respondent's Outline of Submissions and the two green books that have been prepared by the First Respondent.

22. The Applicants, in their submissions, have not really put forward any ground that would suggest a jurisdictional error on behalf of the Tribunal. The First Applicant has simply sought that the Court act in a way that would enable them to have visas to give them another chance. The Applicants have expressed their desire to continue to live in Australia and to continue their work here, having spent a number of years here already.
23. I pointed out to the Applicants that I hope that they are able to, in the longer term, remain living here in Australia, but I am not in a position of being able to simply grant them a visa.
24. The Court's job is to decide whether or not the Tribunal made a jurisdictional error, and for reasons that I will come to, in my view, the Tribunal has not been guilty of jurisdictional error.
25. So far as the grounds that have been put into the application, the first point to note is that ground number 1, that, "*The Tribunal has accepted that Australian business and permanent residents will be affected but still has not waived off PIC 4020*", is, in my view, not a proper ground for an application such as the present one. It does not raise any question of a jurisdictional error.
26. The second ground, "*The Tribunal has not considered the fact that there was no need for me to give a bogus loan document, especially when my father was working as manager of the bank*", it seems to me that that particular ground is somewhat irrelevant. The Applicant has acknowledged that the document was given and acknowledges that it is a bogus document. In my view, ground 2 has no merit and should be dismissed.
27. The third ground is, "*The Tribunal has not considered the fact that I have never given any bogus documents to the immigration and I cannot*

be held liable for any act or conduct of the education agent, especially when I had never given any bogus document to the agent to pass on to the immigration department". Now, in relation to that, the Tribunal has dealt in some detail with the question of the bogus document and the involvement that the First Applicant had in it being provided.

28. It seems to me that it is wrong for the Applicant to say that the Tribunal has not considered the fact that is raised in that ground. The Tribunal has given detailed reasons as to why the application for a visa should be denied. In my view, the reasons do not reveal any jurisdictional error, as I have pointed out to the Applicants earlier today.
29. The application should be dismissed pursuant to *Federal Circuit Court Rules 2001* (Cth), r.16.01.
30. I will order that the Applicants pay the First Respondent's costs fixed in the sum of \$5,000. It is still a large sum of money but the First Respondent is entitled to its costs.
31. I make the orders to be found at the beginning of these reasons.

I certify that the preceding thirty-one (31) paragraphs are a true copy of the reasons for judgment of Judge Simpson

Associate:

Date: 7 May 2015